



# **COP-MOP 1 DECISION ON LIABILITY AND REDRESS**

**Analysis of Implications and Challenges**



# COP-MOP 1 DECISION ON LIABILITY AND REDRESS

## Analysis of Implications and Challenges for Eastern and Southern Africa

Godber Tumushabe<sup>1</sup>  
Ronald Naluwairo<sup>2</sup>

*ACODE Policy Briefing Paper No.4, 2004*

- 
- <sup>1.</sup> *Godber Tumushabe is the Executive Director of Advocates Coalition for Development and Environment (ACODE) - an Independent Public Policy Research and Advocacy think tank based in Uganda.*
  - <sup>2.</sup> *Ronald Naluwairo is an Advocate and Research Fellow with the Intellectual Property Rights (IPR) and Biotechnology Policy Programme of Advocates Coalition for Development and Environment*

## Table of Contents

	Page
List of Acronyms .....	i
Acknowledgements .....	ii
Executive Summary .....	iii
1. Introduction .....	1
2. Background to the decision .....	3
3. From the CBD to the Cartagena Protocol on Biosafety .....	4
4. Status of Signatures, Ratifications and Entry into force of the Cartagena Protocol on Biosafety for Countries in Eastern & Southern Africa.....	6
5. COP-MOP 1 Decision on Liability & Redress .....	7
6. Opposition to the Negotiations May Remain .....	10
7. Implications of Decision UNEP/CBD/BS/ COP-MOP/1/1.8 for Countries in Eastern and Southern Africa .....	12
8. Conclusion .....	15
9. Annex 1 .....	16
10. References .....	20

## **List of Acronyms**

ACODE	Advocates Coalition for Development & Environment
AIA	Advanced Informed Agreement
BSWG	Open - ended Adhoc Biosafety Working Group
CBD	Convention on Biological Diversity
COP	Conference of the Parties
COP- MOP I -	Conference of the Parties Serving as the First Meeting of the Parties to the Cartagena Protocol.
EXCOP	Extraordinary Meeting of the Conference of Parties
GMOs	Genetically Modified Organisms
HIVOS	Humanist Institute for Development Cooperation
ICCP	Inter - governmental Committee for the Cartagena Protocol
ILC	International Law Commission
IPR	Intellectual Property Rights
LMOs	Living Modified Organisms
NEPAD	New Partnerships for African Development
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
WCED	World Commission on Environment & Development.

## **Acknowledgements**

This Briefing paper is an analysis of the COP-MOP 1 Decision: **UNEP/CBD/BS/COP-MOP 1/L.8** on Liability and Redress, its implications and Challenges for countries in Eastern and Southern Africa.

We are indebted to Humanist Institute for Development Cooperation( HIVOS) who provided financial support to ACODE under its IPR & Biotechnology Policy Programme that facilitated the production and publication of this Policy Briefing Paper.

## Executive Summary

The Conference of the Parties Serving as the First Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP1) that took place in February 2004, in Kuala Lumpur, Malaysia adopted many decisions in as far as achieving the objectives of the Protocol is concerned. One of the most important decisions was Decision *UNEP/CBD/BS/COP-MOP/1/L.8* which set in motion a process for the further elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of living modified organisms (LMOs). The decision established the mandate for negotiations on the International Liability and Redress Regime for LMOs. This Briefing paper is therefore an analysis of that decision, its implications and Challenges for countries in Eastern and Southern Africa.

We observe in this paper that the most important thing in the struggle for an International Liability regime for LMOs is not having the regime per-se but its nature, scope and compliance mechanism. We argue that given their limited risk assessment and management capacities for LMOs, countries in Eastern and Southern Africa have a direct stake in ensuring that any International liability regime for LMOs agreed upon works for them. This makes the negotiation process crucial for these countries.

In order for these countries to effectively participate in these negotiations, we make some recommendations we think are vital to this process. These are made basing mainly on past experiences of most African countries in international negotiations.

These recommendations include among others, the urgent need to undertake analytical work based on the terms of reference for the Open-ended Adhoc Working Group of Legal and Technical experts on the Liability and Redress; the need to build an effective alliance and nominate members to the Technical group of Experts on Liability and Redress.

We strongly believe that if our countries consider these recommendations, the Eastern and Southern Africa region can set or substantially influence the agenda of this negotiation process.

## 1. Introduction

The adoption of the Cartagena Protocol on Biosafety<sup>1</sup> represents, perhaps the most authoritative expression of global consensus on the potential risks associated with the application, handling and use of Living Modified Organisms (LMOs). The Protocol seeks to establish legally binding global norms and rules to regulate the transboundary movement of LMOs. Having failed to reach compromise on the issue of redress and damage arising from the transboundary movement of LMOs during the negotiations of the Protocol, the parties agreed to an in-built agenda to deal with this issue under Article 27 of the Protocol.

*The Cartagena Protocol on Bio-safety is an internationally binding set of rules that seek in accordance with the precautionary principle to contribute to ensuring an adequate level of protection in the field of safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and especially focusing on transboundary movements.*

The Protocol and the forthcoming negotiations therefore are the essential embodiment of the efforts to develop legally binding global norms and rules on issues of liability and redress as a way of strengthening the legal regime established by the Protocol. Consequently, the First Meeting of the Parties to the Protocol that took place in Kuala Lumpur, Malaysia in February 2004 set in motion a process

---

<sup>1</sup> The protocol was adopted by the Conference of the Parties (COP) in Montreal on 29<sup>th</sup> January 2000 and came into force on 11<sup>th</sup> September 2003, ninety days after receipt of the 50<sup>th</sup> instrument of ratification in accordance with article 37.

for the further elaboration of Article 27 and the development of an agreement on liability and redress. The mandate for the negotiations is set out in Decision UNEP/CBD/BS/COP-MOP/1/L.8.

The purpose of this policy briefing paper is to set out the main elements of the COP-MOP1 Decision<sup>2</sup> which mandates the negotiations on liability and redress, analyze the implications of the decision for countries in Eastern and Southern Africa and offer some preliminary thoughts on the challenges faced by these countries in the forthcoming negotiations. It is here argued that since the national legal regimes do not adequately address issues of liability and redress arising from the transboundary movement of LMOs, Eastern and Southern Africa countries should take specific actions to promote effective participation in the negotiations to ensure that the outcome of these negotiations reflect the legal realities and the national interests of these countries.

---

<sup>2</sup> UNEP/CBD/BS/COP-MOP/1/L.8

## 2. Background to the decision

The background to the mandate set out in Decision UNEP/CBD/BS/COP-MOP/1/L.8 can be traced back to the 1992 Convention on Biological Diversity (CBD)<sup>3</sup>

Prior to the UNCED, the World Commission on Environment and Development(WCED)<sup>4</sup> while recognizing the significant role that new technologies could play, urged caution on the introduction of new technologies including biotechnology. The Commission cautioned that “new life forms produced by genetic engineering should be carefully tested and assessed for their potential impact on health and on the maintenance of genetic

*The CBD seeks among other things to ensure the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including appropriate access to genetic resources and appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies by appropriate funding.*

Source: Article 3 CBD

diversity and ecological balance before they are introduced to the market, and thus to the environment”.<sup>5</sup>

The concern over the potential risks of new technologies and in particular biotechnology combined with issues of intellectual property rights led to protracted negotiations over the provisions relating to biotechnology.

<sup>3</sup> The Final Act of the Convention on Biological Diversity was adopted in Nairobi in May 1992 and opened for signature in the same year during the United Nations Conference on Environment and Development (UNCED) which took place in Rio de Janeiro, Brazil. It entered into force on 29<sup>th</sup> December 1992.

<sup>4</sup> WCED, 1987. *Our Common Future*. Oxford University Press. Oxford and New York.

<sup>5</sup> *Ibid.* pp219.

In the absence of clear compromises, the parties agreed to an in-built agenda that is expressed in Article 19.3 of the Convention. Article 19.3 therefore obliged Parties to the CBD to ***consider the need for and modalities of a protocol setting out appropriate procedures ..... in the field of the safe transfer, handling and use of any living modified organism that may have adverse effects on conservation and sustainable use of biological diversity.***

### 3. From the CBD to the Cartagena Protocol on Biosafety

At the first Conference of the Parties of the CBD in 1994, the Parties established an open-ended *Ad Hoc* Group of Experts on Biosafety to start considering the implementation of the CBD provisions on biotechnology and biosafety.<sup>6</sup> A year later in 1995, the second Conference of the Parties in Jakarta, Indonesia adopted a decision<sup>7</sup> establishing an open-ended *Ad Hoc* Working Group on Biosafety to elaborate a protocol ***on biosafety, specifically focusing on transboundary movement of any living modified organisms (LMOs) that may have an adverse effects on biological diversity.*** During the first meeting of the Open-Ended *Ad Hoc* Working Group on Biosafety, there were already clear indications that the issue of liability would be very controversial and that reaching an agreement on the appropriate rules would be difficult.<sup>8</sup> Proposals to address this issue in the context of article 14.2 of the CBD did not offer a compromise either.

Indeed, the Consolidated Text of the Draft Articles at the end of BWG-3 included seven options for dealing with the issue of liability and redress.<sup>9</sup> Through the sessions of the

---

<sup>6</sup> COP 1 took place in Bahamas in November 1994.

<sup>7</sup> Decision 11/5

<sup>8</sup> See UNEP/CBD/COP/3/26, 15 September 1996.

BSWG, the issue of developing an international liability and redress regime for LMOs proved a hard nut to crack due to its complex and sensitive nature<sup>10</sup>. The parties failed to reach specific agreement on the precise rules, nature and scope of liability and redress issues. The broad compromises establishing a future mandate for the parties to the Protocol is what is provided for under article 27 of the Protocol.

Article 27 of the Protocol therefore mandated:

***The Conference Of the Parties serving as the Meeting Of the Parties to the Protocol, at its first meeting to adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of LMOs, analyzing and taking due account of the ongoing processes in international law on the said matters.***

In preparation of the First Meeting of the Parties to the Protocol therefore, the CBD - COP established and requested the Intergovernmental Committee for the Cartagena Protocol (ICCP) among other things to elaborate a draft recommendation on the process for elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of LMOs including a review of existing and relevant instruments and identification of elements for liability and redress. After serious work, the ICCP adopted a recommendation for a draft decision of COP-MOP 1 regarding the process to be adopted under Article 27. This recommendation was subsequently discussed and adopted with minor modifications at the COP-MOP 1 meeting in Kuala Lumpur thus the decision UNEP/CBD/BS/COP-MOP/1/L.8

---

<sup>9</sup> See CBD Secretariat, 2003. *The Cartagena Protocol on Biosafety: A Record of the Negotiations.*

#### 4. Status of Signatures, Ratifications and Entry into force of the Protocol for Countries in Eastern & Southern Africa

COUNTRY	SIGNATURE	DATE OF RATIFICATION	ENTRY INTO FORCE
Uganda	24 <sup>th</sup> May 2000	30 <sup>th</sup> November 2001(rtf)	11 <sup>th</sup> September 2003
Kenya	15 <sup>th</sup> May 2000	24 <sup>th</sup> January 2002 (rtf)	11 <sup>th</sup> September 2003
United Republic of Tanzania		24 <sup>th</sup> April 2003(acs)	11 <sup>th</sup> September 2003
Ethiopia	24 <sup>th</sup> May 2000	9 <sup>th</sup> October 2003(rtf)	7 <sup>th</sup> January 2004
Egypt	20 <sup>th</sup> December 2000	23 <sup>rd</sup> December 2003(rtf)	21 <sup>st</sup> March 2004
Zambia		27 <sup>th</sup> April 2004 (acs)	25 <sup>th</sup> July 2004
Zimbabwe	4 <sup>th</sup> June 2001		
South Africa		14 <sup>th</sup> August 2003 (acs)	12 <sup>th</sup> November 2003
Namibia	-	24th May 2000	-
Lesotho	-	20th September 2001(acs)	11th September 2003

Source: [www.biodiv.org](http://www.biodiv.org)

**Note:** The column entitled 'Ratification' indicates the dates when the instrument of ratification (rtf) or acceptance (acs) was deposited with Depositary. The column entitled 'Entry into force' indicates the dates when the protocol enters into force for respective states i.e. ninety days after it deposits instrument of ratification or acceptance.

## 5. COP-MOP 1 Decision on Liability and Redress

Decision *UNEP/CBD/BS/COP-MOP/1/L.8*, arising out of the first Meeting of the Parties to the Protocol establishes a mandate for negotiations on liability and redress and elaborates on the key elements that should be addressed during the negotiations. The Preamble to the Decision is particularly instructive in defining the scope of the mandated negotiations. From the onset, it is recognized that ***the appropriate elaboration of international rules and procedures regarding liability and redress is crucial for the effective implementation of the Protocol.***

This is important because throughout the work of the ICCP, there were those parties who argued that liability and redress relating to transboundary movement of LMOs should be left to other instruments or national legal regimes. Consequently, this preambular paragraph clearly demonstrates the importance that many parties, and more especially the developed countries, attach to the elaboration of globally binding rules on liability and redress issues.

Secondly, the preamble to the Decision also recognizes the distinct nature of liability and redress issues under article 27 of the Protocol and those issues referred to under Article 14 of the Convention on Biological Diversity as well as the compliance procedures and mechanisms under the Protocol.<sup>11</sup> As already alluded to, Article 14.2 of the CBD provides that ***the COP shall examine, on the basis of studies to be carried out the issue of liability and redress, including restoration and compensation, for damage to biological diversity except where such liability is a purely internal matter.*** During the work of the BSWG, some of the delegations argued that liability and redress issues under the Protocol could be

---

<sup>11</sup> Article 34

handled in the same process as that under Article 14 of the CBD. Consequently, the Decision helps in defining the scope of the negotiations by clearly articulating the distinction between the issues addressed by the two Articles under the two Agreements.

Thirdly, the COP-MOP1 Decision on liability and redress recognizes the distinction between the regime to be elaborated in the context of Article 27 and the compliance procedures and mechanisms under article 34 of the Protocol. It is important to emphasize that Article 34 purely deals with compliance and the obligations established under the Protocol. It could therefore relate to compliance with Advanced Information Agreements (AIA), transportation, handling, contained use, etc. The present Decision therefore creates clarity that can help to ensure that the negotiations are more focused on issues of liability and redress, and will also provide the framework for developing a common understanding of Article 27 of the Protocol.

***Some of the Elements of Rules and Procedures to be considered under Article 27 of the Protocol***

- § *Definition and nature of damage, including scope of damage resulting from LMOs;*
- § *Valuation of damage to biodiversity and to human health;*
- § *Threshold of damage;*
- § *Causation;*
- § *Channeling of liability;*
- § *Roles of import and export;*
- § *Standard of liability;*
- § *Mechanisms of financial security;*
- § *Standing/right to bring claims.*

***Source: UNEP/CBD/BS/COP-MOP/1/L.8***

The Decision establishes structures for the mandated negotiations. Paragraph 1 of the Decision establishes an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress to undertake the negotiation process. The terms of reference for the working group are set out in annex1 to the decision.<sup>12</sup> In addition, paragraph 4 is a request to the Executive Secretary to the Convention on Biological Diversity to convene a Technical Group of Experts on Liability and Redress to undertake preparatory work for the first meeting of the Open-ended Ad Hoc Working Group. By this decision, the Executive Secretary is requested to ensure fairness and equity in geographic representation to the Technical Group of Experts.

It is important to note that historically, it will be the Technical Group of Experts that sets and defines the agenda of the Ad Hoc Working Group. Consequently, representation and participation of Eastern and Southern Africa countries in the Technical Working Group is as crucial as the participation in the Ad Hoc Working Group. Yet, it is not clear who will ensure such representation. Will it be the Regional Office for Africa at UNEP, is it the Africa Union or could it be NEPAD? Is it possible that the Secretariat to the CBD will use its discretion to select who will represent the different regions? It is important to use any early opportunity to address this question.

Finally, the COP-MOP1 acknowledges the earlier commitments by the Parties to “endeavor to complete this process [of elaborating international rules of procedure in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms] within four years. Experience shows that efforts to agree on international legal norms and procedures on responsibility

---

<sup>12</sup> See annex to this briefing paper.

for damage, liability and redress often take a long time. The International Law Commission (ILC) for example has been working on the issue of state responsibility for all over its 50 years+ of its existence.<sup>13</sup> Given the strict timeframe within which the Open-ended Ad Hoc Working Group is likely to conduct the negotiations, it is important that African countries waste no time in nominating their delegations to the Ad Hoc Working Group as well as the Technical Working-Group of Experts.

## 6. Opposition to the Negotiations May Remain

Several countries led by USA<sup>14</sup> had long argued that there was no need to establish an independent international liability and redress regime for damage resulting from LMOs as any such damage could adequately be catered for by the existing liability and redress regimes<sup>15</sup>. However the intricate and special nature of potential risks to human health and the environment that LMOs present call for a special liability regime. For instance concerning environmental damage by LMOs, there remains significant uncertainties concerning the extent of potential harm and its timeline. Further, the adverse impacts from LMOs are not limited to environmental impacts but also extend to the different social-economic impacts that must be addressed<sup>16</sup>.

Although there exists at the international level, a couple of general principles under which states can be held liable for damage resulting from the transboundary movement of LMOs<sup>17</sup>, most of these are not binding and they don't provide sufficient guidance in the case of environmental damage.

<sup>13</sup> The final text of the draft Articles of the ILC were adopted at its 53<sup>rd</sup> Session in August 2001

<sup>14</sup> These countries also known as the Miami Group include the main producers and traders of LMOs namely: Canada, Australia, Argentina, Chile and Uruguay.

<sup>15</sup> *Ibid* n. 10 pp 82-83

<sup>16</sup> Cullet Philippe Feb 2004, *Liability and Redress in Biotechnology: Towards the Development of Rules at the National and International Levels (Background paper to IELRC Side-events on Liability)* p.9. Also see Article 26 of the Protocol.

It has also been argued sometimes that damage from LMOs could be covered under the existing international civil liability regimes. But although different treaties<sup>18</sup> include specific liability regimes in case of activities deemed dangerous such as hazardous waste disposal, nuclear energy and oil pollution damages, these are sectoral and as such may not necessarily cover damage from LMOs. And with regard to their scope of damage, although environmental damage is always taken into account through the consideration of damage to persons, property and economic interests, other elements such as costs of restoration of the degraded environment are not always given due weight<sup>19</sup>. As such the international civil liability regimes are not suited to address the potential risks from LMOs.

At the national level, it has always been argued that the common law torts of negligence, nuisance and the rule in *Rylands V Fletcher*<sup>20</sup> are effective tools for liability and redress for handling, transfer and use of LMOs. These torts are however riddled with a number of limitations especially in the context of the special risks and hazards that LMOs present. These limitations include among others: the narrow interpretation of locus standi; the requirement of foreseeability of damage on the part of the defendant and the limitation periods.<sup>21</sup> The tort approach to liability and redress in the context of LMOs does not also have the preventive function and runs the risk of reducing environment contamination to a problem between neighbors that would

---

<sup>17</sup> For instance under Principle 2 of the Rio Declaration on Environment and Development, states have a duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. And under Article 2 of the International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts, States are generally responsible for all their wrongful acts.

<sup>18</sup> Examples of such treaties include the Basel Protocol on Liability and Compensation resulting from Transboundary Movement of Hazardous Wastes, the Convention on International Liability for Damage caused by Space Objects and the Convention on Civil Liability for Oil Pollution Damage

<sup>19</sup> Ibid note 16

<sup>20</sup> This rule applies to anything brought on land in the course of its non-natural use that is likely to do mischief on escape.

<sup>21</sup> For a more detailed discussion on the issue of common law remedies, see ACODE Policy Research Papers No 8 & 9, 2004

fail to involve the person or entity holding patent rights and/or commercializing the GM product<sup>22</sup>.

It is for the above reasons among others that we authoritatively conclude that there exists no liability regime at the moment suited to handle the special risks and hazards that LMOs present. Moreover development of an international liability regime will not only end at providing a compensatory mechanism for situations where harm occurs, but would also act as a compliance incentive for the protocol<sup>23</sup> and foster implementation of other international environmental law principles such as the polluter pays and the precautionary principles.

## **7. Implications of Decision UNEP/CBD/BS/COP-MOP/1/L.8 for countries in Eastern and Southern Africa.**

While Uganda and other developing countries should congratulate themselves for having won the war on Article 27 of the Protocol, the battle is only yet to start. For the most important thing in this struggle for an International Liability regime for LMOs is not having the regime per-se but its nature, scope and the compliance mechanism. This therefore makes the negotiation process a critical and central issue to many developing countries. The challenge is only starting and would require thoughtful and consistent deliberations on the issues involved.

The fact that the legal liability and redress regimes in most developing countries are still lagging behind and that they have very limited capacity for risk assessment and risk

---

<sup>22</sup> Richard Burnett-Hall 2003, *Liability for Damage Caused by Genetically Modified Organisms: The Existing Law* (in *Agriculture & Environment Biotechnology Commission, GM Crops? Coexistence & Liability at Annex D London: Biotechnology Commission, 2003.*

<sup>23</sup> *The Royal Institute of International Affairs 2002, The Cartagena Protocol on Bio-safety: Reconciling Trade in Biotechnology with Environment and Development. P 373*

management, these countries have a direct stake in ensuring that any international liability regime for LMOs agreed upon takes into account their peculiar circumstances including consideration of issues of technical and legal capacity. For this to happen, it is proposed that countries in the sub-region should immediately do a number of things.

### **Constitute delegations to the Open-ended Ad Hoc Working Group of Legal and Technical Experts**

Traditionally, Countries in Eastern and Southern Africa like many other developing countries do not constitute delegations for any negotiations. Quite often, individuals are selected in response to invitations by the relevant structures managing the negotiations provided they have offered to meet the costs of attendance at these meetings. This situation has two major implications: first, it does not provide an opportunity for long-term investment by individual negotiators in understanding the nature and content of the negotiations. Secondly, because of the ad hoc nature in which delegations to these meetings are selected, there are often no budgetary allocations for those negotiators and it is difficult to raise funds to support these processes. Constituting the delegations would create opportunities for mobilizing financial resources for the negotiations and open up lines of responsibility and accountability on the part of the institutions and individuals involved.

### **Identify and nominate members to the Technical Group of Experts on Liability and Redress**

Countries in Eastern and Southern Africa who have signed and or ratified the Protocol should ensure that the sub-region is effectively represented in the Technical Group of Experts established under the COP-MOP1 decision. This is one of the

key ways that as a region, we can be able to define the agenda and shape the norms that will emerge from these negotiations.

### **Undertake or mandate analytical work based on the terms of reference**

Expert analysis of the issues contained in the terms of reference for the Open-ended Ad Hoc Working Group is essential for influencing the norms that will be established through the mandated negotiation process. Experience with previous negotiations shows that countries in Eastern and Southern Africa have not invested in analytical studies to inform national negotiating positions. Even in areas such as trade negotiations where we see attempts to undertake analytical work, this is always donor motivated and undertaken in many cases by the Northern based consultants. What is needed therefore is to identify and mandate African experts to undertake the analytical work necessary to inform national and regional negotiating positions.

### **Building an Effective Alliance**

Finally, there is need to create forums and regional dialogues where positions of a regional nature can be articulated. Countries in Eastern and Southern Africa are bound by common problems, shared priorities and a common destiny determined by the need to eradicate poverty while promoting economic growth and preserving the integrity of our environment and natural resources base.

## **8. Conclusion**

We have observed that the national legal regimes in many countries in the sub-region are lagging behind the developments in biotechnology and therefore are not well suited for addressing liability and redress issues related to LMOs. Consequently, the process mandated by Decision **UNEP/CBD/BS/COP-MOP/1/L.8** presents an opportunity for countries in the sub-region to be proactive and avoid the common tendency of reacting to processes and events. However, the challenge is for the countries to take this opportunity, establish the structures and undertake the analytical work necessary to shape and influence the negotiating agenda. The strategy should be to ensure solidarity among the countries and build a sub-regional

alliance that can articulate collective ideas and proposals during the work of the Open-ended Ad Hoc Working Group.

## **9. Annex I**

### **TERMS OF REFERENCE FOR THE OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

1. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress (hereinafter referred to as Ad Hoc Group on Liability and Redress) established pursuant to Article 27 of the Protocol shall be composed of representatives, including legal, technical and scientific experts, nominated by Parties to the Protocol. The Ad Hoc Group on Liability and Redress shall be open to the participation as observers of any State not a Party to the Protocol, international organizations, non-governmental organizations and industry.

2. The Ad Hoc Group on Liability and Redress shall elect its chairperson and other officers.

3. The Ad Hoc Group on Liability and Redress shall review the information relating to liability and redress for damage resulting from transboundary movements of living modified organisms, and shall:

(a) Examine the information provided by Parties, Governments, relevant international organizations and stakeholders pursuant to recommendations 2/1, paragraph 2, and 3/1, paragraph 1, of the Intergovernmental Committee for the Cartagena Protocol on Biosafety, the synthesis of that information by the Secretariat, as well as information provided to date by the Secretariat in the context of liability

and redress under Article 14, paragraph 2, of the Convention on Biological Diversity;

(b) Examine the information and initial understandings submitted by Parties, Governments, relevant international organizations and stakeholders on the basis of the questionnaire on liability and redress for damage resulting from transboundary movements of living modified organisms annexed to recommendation 3/1 of the Intergovernmental Committee for the Cartagena Protocol on Biosafety, as well as further views submitted by them on the matter covered under Article 27 of the Protocol;

(c) Take into account the report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (UNEP/CBD/BS/COP-MOP/1/INF/8) that was held in Rome from 2 to 4 December 2002 and was a forum for discussion;

(d) Request any information that may be required to assist the work on Article 27 of the Protocol; and

(e) Take due account of the ongoing processes in international law on the matters covered under Article 27 of the Protocol.

4. The Ad Hoc Group on Liability and Redress shall, on the basis of foregoing information, analyse the issues relevant to liability and redress with a view to building understanding and consensus on the nature and contents of international rules and procedures referred to in Article 27 of the Protocol. In doing so, it shall:

(a) Analyse general issues relating to:

(i) The potential and/or actual damage scenarios of concern that may be covered under the Protocol in order to identify

the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed;

(ii) The application of international rules and procedures on liability and redress to the damage scenarios of concern that may be covered under Article 27 of the Protocol;

(b) Elaborate options for elements of rules and procedures referred to in Article 27 of the Protocol, which may include, *inter alia*:

(ii) Definition and nature of damage, including scope of damage resulting from transboundary movement of living modified organisms;

(iii) Valuation of damage to biodiversity and to human health;

(iv) Threshold of damage;

(v) Causation;

(vi) Channeling of liability;

(vii) Roles of Parties of import and export;

(viii) Standard of liability;

(ix) Mechanisms of financial security;

(x) Standing/right to bring claims.

5. The Ad Hoc Group on Liability and Redress shall report on its activities and progress to each subsequent meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. At the first meeting of the Conference of the Parties serving as the Parties to the Cartagena Protocol on Biosafety after the Group has been established for two years, the Conference of the Parties serving as the meeting

of the Parties to the Protocol shall review the progress and if necessary provide guidance to the group. The Ad Hoc Group on Liability and Redress shall present its final report, together with the proposed international rules and procedures in the field of liability and redress pursuant to Article 27 of the Protocol, to the Conference of the Parties serving as the meeting of the Parties to the Protocol.

6. The Ad Hoc Group on Liability and Redress shall complete its work in 2007 in order to enable the Conference of the Parties serving as the meeting of the Parties to the Protocol to fulfill the requirements under Article 27 of the Protocol. The Executive Secretary will convene a Technical Group of Experts on Liability and Redress composed of experts nominated by Parties to the Protocol and based on a fair and equitable geographical representation to undertake preparatory work for the first meeting of the Ad Hoc Group on Liability and Redress. Subject to review at each meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol, the following arrangements may be used as an indicative work plan for the Ad Hoc Group on Liability and Redress:

***Indicative work plan of the Technical Group of Experts and the Ad Hoc Group on Liability and Redress***

<b>Time</b>	<b>Meetings</b>	<b>Length</b>
Technical Group of Experts 2004	Preparatory meeting	3 days
Ad Hoc Group 2005	First meeting	5 days
Ad Hoc Group 2005	Second meeting	5 days
Ad Hoc Group 2006	Third meeting	5 days
Ad Hoc Group 2007	Fourth meeting	5 days
Ad Hoc Group 2007	Fifth meeting	5 days

## **10. References**

1. ACODE Public Policy Series No 1, 2004, 'The African Policy Makers Workshop on the Negotiations for a Liability and Redress Regime under the Cartagena Protocol on Biosafety: Report of the Proceedings'
2. ACODE Public Policy Series No 2, 2004, 'East African Regional Workshop on Genetically Modified Organisms: Report of the Proceedings'
3. CBD News Special Edition. 'Cartagena Protocol on Biosafety: From Negotiation to Implementation'
4. CBD Secretariat (2003), 'Handbook of the Convention on Biological Diversity'
5. CBD Secretariat, 2003 'The Cartagena Protocol on Biosafety: A Record of the Negotiations'
6. Christopher Bail, Robert Falkner & Helen Marquard. (2001), 'The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment & Development?' The Royal Institute of International Affairs.
7. Daniel Sitarz (1994), 'Agenda 21: The Earth Summit Strategy to save Our Planet'
8. Discussion UNEP/CBD/BS/COP-MOP/1/1.8
9. Gillet Phillippe (2004), Liability and Redress in Biotechnology: Towards the Development of Rules at the National and International Levels (Background paper

- to IELRC Side-event on Liability)
10. International Environmental Law Research Centre (2003), 'Liability and Redress under the Cartagena Protocol: Report of the Workshop held in Mombasa, Kenya 22-26<sup>th</sup> September 2003'
  11. IUCN Environmental Policy Law Paper No. 46 (2003), 'An Explanatory Guide to the Cartagena Protocol on Biosafety'.
  12. Rio Declaration on Environment & Development, 1992
  13. The Cartagena Protocol on Biosafety, 2000
  14. The Convention on Biological Diversity, 1992.
  15. World Commission on Environment and Development (WCED), (1987) 'Our Common Future'. Oxford University Press. Oxford and Newyork.